UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

YELLOWPAGES.COM LLC	Case Nos. 22-RD-117441
	28 -RD-117449
Employer	05-RD-117540
	04-RD-117629
and	06-RD-117644

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1269

Union

and

RONALD WILPON, DEREK ANDERSON, HEATHER MARINO, CARLA EDWARDS, AND MELONY SHOOK,

Petitioners

UNION'S OPPOSITION TO REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION DISMISSING PETITIONS

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OPPOSITION TO REQUEST FOR REVIEW

International Brotherhood of Electrical Workers, Local 1269 ("the Union") submits this brief in opposition to the Petitioner's and Employer's Requests for Review of the Acting Regional Director's January 8, 2014, Decision dismissing all petitions in the above-captioned matter.

The sole issue raised on appeal is whether the Acting Regional Director correctly concluded that the master collective bargaining agreement ("the CBA") applicable to all five bargaining units involved here (along with several other units not at issue) constitutes a contract bar to each of the five petitions. And the sole issue with regard to that question has been narrowed down to an even more discrete issue: Whether the Acting Regional Director correctly concluded that the CBA, which by agreement of the parties was not effective until ratified by the Union, was ratified as of November 15, 2013, the date upon which employees at all covered locations cast ratification votes, rather than on November 22, 2013, the date on which the votes were tallied and the results communicated. We show below that the Acting Regional Director correctly decided this question, and correctly dismissed all five petitions, each of which was filed after November 15, 2013.[1]

The facts pertinent to the timing of the ratification process need not be re-hashed here, for they are laid out in appropriate detail in the Acting Regional Director's Decision. It may suffice to reiterate that the parties executed the CBA in October; the CBA was subject to ratification by the Employer's Board and by the Union; the parties' ratification did not condition the effectiveness of the CBA on notice of ratification to the

[1] All dates hereafter are in 2013, unless otherwise noted.

Employer; the Employer's Board ratified the CBA prior to November 15; employees at all locations covered by the CBA cast their ratification votes on November 15; those votes were tallied on November 22 and showed a majority vote in favor of ratification; the decertification petitions at issue here were filed between November 20 and November 22 at 4:18 p.m.; and the Union communicated the ratification vote results to the Employer shortly after 5:00 p.m. on November 22.

The Acting Regional Director, in deciding that ratification was achieved on November 15, when a majority of employees voting cast ballots affirming the CBA, noted at the outset of his Decision that no prior Board decision has addressed what appears to be the unique situation here: does a signed contract that is subject to ratification constitutes a bar as of the date the ratification vote was conducted or instead as of the date when the votes were tallied and the results communicated. The Acting Regional Director thus appropriately looked to cases addressing similar circumstances, in similar contexts.

The Acting Regional Director started out with a discussion of the well-accepted proposition that neither the Employer nor the Board may question the process of ratification utilized by a Union; rather, it is completely up to the Union how to go about accomplishing ratification. See, *e.g.*, *New Process Steel,* 355 NLRB 111, 114-117 (2008), affirmed on remand, 355 NLRB 576 (2010).

The Acting Regional Director then went on to discuss a key point of contention raised by the Employer in its Request for Review: whether an employer must receive notice of the union's ratification of the contract for the contract bar to become effective, even in the absence of an explicit requirement for such notice in the parties' agreement

conditioning the contract on ratification. The Acting Regional Director cited *United Health Care Services, Inc.*, 326 NLRB 1379 (1998), and *Felbro, Inc.*, 274 NLRB 1268, 1268 fn. 2 (1985), to support his conclusion that such notice is not required in the absence of an explicit agreement between the parties. Of course, here, the parties had no such agreement conditioning ratification upon notice to the Employer.

United Health Care Services is a case, like ours, involving the question of when ratification was achieved, thus raising a contract bar to a decertification petition. The Regional Director in that case, citing *Felbro*, noted that the union president's approval of the contract constituted the ratification necessary to raise the bar, even though the ratification was not communicated to the employer until a later date, after the filing of the decertification petition.

The Employer takes issue with the Acting Regional Director's reference to *United Health Care Services* because the Board affirmed the Regional Director's decision with a split vote. Be that as it may, the Regional Director's decision in *United Health Care Services* nonetheless provides persuasive authority supporting the conclusion that notice of ratification is not a necessary component of ratification absent an agreement to the contrary.[2]

In any event, *Felbro* represents a decision of the Board itself, and remains good law, notwithstanding the Fourth Circuit's refusal to enforce the Board's order in *American Protective Services, Inc.*, 319 NLRB 902 (1995), another case in which the

[2] Indeed, the General Counsel's *Outline of Law and Procedure in Representation Cases* (2012), at Section 9-180, p. 86, cites *United Health Care Services* as authority for the Board rule making prior ratification necessary for contract-bar purposes only where ratification is made an express condition precedent in the contract itself.

Board made reference to *Felbro* to support the proposition that an employer need not always receive notice of a union's ratification to consummate the act of ratification. 113 F.3d 504 (4th Cir. 1997). (The Fourth Circuit actually had no occasion to address the rule announced in *Felbro*, but instead focused on the right of the employer to withdraw a contract offer before the employer had received an acceptance of the offer.) Indeed, the Ninth Circuit granted enforcement to the Board's order in *Felbro*. *Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (1986). The Ninth Circuit, in upholding the Board's finding that the employer in *Felbro* unlawfully failed to execute a contract, reasoned that because the parties' ground rules specified "ratification" as the critical act, and not notification of the ratification vote, then even under traditional rules of contract law, the parties' own expressed intent would govern. 795 F.2d at 713. The same reasoning applies here, where the parties agreed that the CBA was contingent simply upon ratification, and not upon notification of the ratification vote.

The Employer also argues the *Felbro*, which was issued in the context of an unfair-labor-practice case, has no bearing in the representation-case context. The Employer bases this argument on its premise that no contract may bar an election petition until notice of ratification has been received by the employer. (Employer's Request for Review, at p. 14.) But that premise is completely contrary to Board law which clearly provides that ratification is *not* always a precondition to an effective contract bar, and indeed is not a precondition absent a ratification provision stated by an express contractual provision. *Appalachian Shale Products*, 121 NLRB 1160, 1162-1163 (1958).

The Employer also argues *Felbro* is inapplicable to representation cases because the policy goal underlying *Felbro*, a Section 8(a)(5) case regarding contract formation,

has no application to contract-bar issues. (Employer Request for Review, p. 14.) In *Felbro*, the Board appears to have applied traditional contract law in concluding that absent an agreement between the parties to make notice of ratification a condition precedent to the effectuation of their contract it was immaterial that the employer received notice of ratification after ratification and after the employer attempted to renege on the contract. 274 NLRB at 1268 fn. 2. The Board there did not necessarily rely on any policy goals in rendering this decision, although the Administrative Law Judge did make reference to the labor policy favoring formation of collective bargaining agreements. Id. at 1282. In any event, the Board in *American Protective Services, supra*, 319 NLRB 902, 904, in making reference to *Felbro*, referred to the Board's "obligation 'to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment.'" The idea here is that in Section 8(a)(5) cases, the Board is concerned about the formation of collective bargaining agreements, which in turn is based on the policy goal of the Act to minimize "industrial strife and unrest" by stabilizing labor relations. But that policy goal is not absent in representation cases, nor is it absent, in particular, in contract-bar cases. As the Employer admits in the main thrust of its argument underlying its Request for Review, one of the factors on which the contract-bar rule is constructed is the stabilization of contractual relations between the parties. See *Appalachian Shale Products Co., supra* at 1161(contract-bar rule designed to achieve balance between policies of stability in labor relations and employee free choice in selection of bargaining representatives). In sum, there are no underlying policy reasons that render the rationale of the *Felbro* rule inapplicable to contract-bar cases.

The Employer here argues contrary to the Board's decision in *Felbro* that the Board has instead established a rule uniformly requiring employer receipt of notice of a union's ratification in order for the ratification process to be complete for contract-bar purposes, even in the absence of an agreement of the parties requiring such notice as a condition precedent to the effectuation of their contract. In support of this proposition, the Employer cites *Westinghouse Electric Corp.*, 111 NLRB 197 (1955), and *Swift & Co.*, 213 NLRB 49 (1974). Neither decision supports the Employer's argument.

In *Westinghouse*, the parties' expressly agreed that notice of the ratification results was one of the conditions precedent to the effectuation of their contract:

> This supplement is signed by the Federation *subject to subsequent ratification* by the Executive Council of the Federation and the Affiliates involved, and *shall become null and void* if written notice of such ratification is not received by the Company from the Federation on or before September 27, 1954.

111 NLRB at 498 (emphasis supplied by Board). Again, the parties in the present case reached no such understanding requiring notice to the Employer of the ratification vote results as one of the conditions to effectuation of the CBA.

And while it is true that the Board in *Swift & Co.*, at the conclusion of its decision, notes that the contract at issue became a binding contract upon the employer's receipt of notification of ratification, the sentence containing that remark is pure *dicta* and completely unnecessary to the holding in that case. The disputed issue in that case is not when the employer received notification of the union's ratification of the contract, but rather whether the union's reliance on ratification votes from three of five units covered by a master contract to determine ratification properly constituted ratification of the

master contract for purposes of barring an election petition at one of the two units which never even participated in the ratification vote. The Board, noting that the process of ratification was not spelled out by the agreement between the employer and the union, concluded that it was up to the union to determine how to conduct its ratification of the master contract, and that the union was not required to conduct a vote among the unit employees who were subject to the election petition. Because the unit of employees covered by the election petition never participated in a ratification vote, the only issue before the Board was whether the union properly ratified the contract, notwithstanding the exclusion of that unit from the process. The Board concluded that the union was entitled to conduct the ratification as it saw fit, and therefore concluded that ratified contract barred the election petition. Whether the employer was notified of the union's ratification before or after the election petition was filed was not a factor determining the outcome in that case.

The Employer also argues that a conclusion that the CBA was ratified on November 15, upon the casting of ratification ballots, rather than on November 22, the date upon which the ballots were tallied, somehow "extends" the "contract bar period," thus "effectively overruling the 'old rule' discussed in *Deluxe Metal Furniture*, 121 NLRB 995, 999 fn. 6 (1958). (Employer's Request for Review, at pp. 12-13.) But in making this argument, the Employer must assume that the actual effective date of the CBA was November 22, not November 15. Only by assuming this can it be said that treating the contract bar as being effective on November 15 effects a "stretching of the contract bar window." The Employer in essence argues that a conclusion that ratification was effected on November 15, rather than November 22, gives the CBA retroactive

effect. Yet this begs the question of just when the CBA was effective. We know the CBA was effective upon "ratification,"[3] and, as show above, the ratification occurred on November 15. Thus, the CBA here falls squarely into the category of contract addressed under the "old rule" that permits a petition only if it is filed before "the effective date of the contract where the contract goes into effect at some time subsequent to the execution." *Id.*

There are additional reasons why the Acting Regional Director got the right result here.

In the absence of prior Board decisions squarely addressing the fact pattern presented here, it is appropriate to look at *Williston on Contracts* for guidance. *New England Lead Burning Co., Inc.*, 133 NLRB 863, 868 fn.2 (1961).[4]

In Section 6:14 of 12 *Williston on Contracts* (4th ed.), "Qualified or conditional acceptable at common law," it is noted (emphasis added; citations omitted):

> [I]t is possible that the offeree will purport to accept but add a condition to the acceptance, the effect of which will render the purported acceptance a counteroffer and hence a rejection. ... Here, we consider yet another variation: *the acceptance which adopts unequivocally the terms of the offer but states that it will not be effective until a certain contingency happens or fails to happen.*
>
> This latter situation may be distinguished from all of the former settings, in that in this case, there is neither a counteroffer and rejection nor is there assent to enter into an immediate bargain. Rather, there is, in effect, an acceptance in escrow, which is not to take effect until the future. In the meanwhile, of course, neither party is bound

[3] See Union Exhibit 1 and Employer Exhibit 1 at p. 1 and at p. 23 (Article 23).

[4] The Board does *not* rely on the law of the State where the events occurred to resolve such questions. *Id.*

> and either may withdraw. ... If neither party withdraws and the delay is not unreasonable, however, *a contract will arise when the contingency happens or the stipulated event occurs*. Unlike the situation where there is a present acceptance subject to a condition which will trigger performance, in this setting there is no present acceptance at all. Rather, *when the triggering event occurs an acceptance automatically occurs as well, forming a contract at that time*.

Thus, *Williston* suggests that a contract subject to a contingency becomes final upon the occurrence of that contingency, even if neither of the parties is aware of the contingency's occurrence until a later date.

Among the decisions applying these common law concepts to the formation of contracts, and their effective date, noted in 12 *Williston on Contracts*, Section 6:14, is *G.V. Corp. v. Bob Todd Realty Co., Inc.*, 102 Ga.App. 190 (1960), where the court addressed the complaint of a property purchaser against the seller for refusal to consummate the contract. The contract called for sale of property, subject to the property being re-zoned to permit apartment construction. The court ruled the contract became effective and binding upon the re-zoning. Thus the contract in that case became effective not at a later date when the re-zoning decision was made known to either the purchaser or the seller, but rather upon the event of the re-zoning decision itself.

Williston and the court's ruling in *G.V. Corp.* both support the Union's argument here that ratification of the parties' contract occurred on November 15, the date the employees actually cast their ratification ballots, not on November 22 when the votes were tallied and the results made known to the Union and to the Employer.

Although not necessarily in the context of the contract-bar doctrine, the Board itself appears to have treated ratification as occurring upon the date the affected

employees cast their votes. *See, e.g., Teamsters Local 287 (Granite Rock Co.)*, 347 NLRB 339, 344 (2006) (contract ratified when submitted to employees for vote).

Further, Board policy makes clear that the process of contract ratification is strictly an internal union matter, and the Board defers to a union's interpretation of its own rules and policies regarding ratification. Here, the Union determined that the contract was ratified upon the employees casting their ratification votes on November 15, 2013. Board policy does not support an effort by the Employer to second-guess that determination.

The Employer's argument that evidence that the Union, between November 15 and November 22, did not *act* in a manner consistent with a conclusion that ratification was effected on November 15, and this somehow undermines the Union's position here ignores a metaphysical reality. (Employer Request for Review, at p. 18-20.) We readily admit the Employer did not know the results of the votes case on November 15 until November 22, but neither did the Union. Thus, the Union, during the week following the November 15 ratification vote, was in no position to *act* one or the other regarding the ratification of the CBA. That this is the case does not detract from the points made above.

Finally, as a logical matter, it simply makes no sense to conclude that a contract ratification vote is effective not when all votes are cast, but only when they are counted. Just as the proverbial tree in the woods actually does fall when it falls, even if there is no one there to see it fall, the act of ratification occurs when the employees cast their ratification ballots; provided, of course, that a majority of the ballots counted were in favor of ratification. Just as the tree actually fell in the woods, even if that fact was not

observed by someone until a later date, a union's observation (via vote tally) of the majority vote in favor of ratification on a date after the votes were actually cast does not change the fact that a majority of ballots in favor of ratification were actually cast on the day of the vote, not on the day they were counted.

The logic of this argument is consistent with the Board's ruling in *Felbro, Inc., supra*, that an agreement contingent on ratification becomes effective upon ratification, even if the employer is not notified. In *Felbro*, the question was not whether a ratified contract was ratified in time to constitute a contract bar to a petition, but rather whether it was ratified in time to block an employer from repudiating the contract. Normal rules of contract formation might have suggested that the employer was free to withdraw from the deal at any time prior to receipt of notice of acceptance by the union. But as the Ninth Circuit pointed out in affirming the Board's decision in *Felbro*, "'technical rules of contract formation do not confine collective bargaining.'" *Garment Workers Local 512 v. NLRB, supra*, 795 F.2d at 713, quoting *Presto Casting Co. v. NLRB*, 708 F.2d 495, 497-98 (9th Cir.), *cert. denied*, 464 U.S. 994 (1983). Thus, the Board in *Felbro* concluded that once the act of ratification was accomplished, the employer was precluded from repudiating a contract that was contingent upon ratification, even if the employer had not received notice of the ratification prior to its attempted repudiation of the contract.

If the Board has concluded that a contract that is contingent upon ratification has been consummated, for purposes of binding an employer and preventing that employer from repudiating the deal, upon the act of ratification, and not upon the employer's receipt of notice of ratification, then it follows that to determine the effective date of a contract that is contingent upon ratification, for contract-bar purposes, it is neither the

date the employer is notified of the ratification nor the date the union tallies the ratification ballots, but the date the employees cast their ratification ballots that is the date of "ratification."

The act of ratification here, after all, is a concept indistinguishable from an election. Just as we all understand that an election constitutes the public vote on a proposition or candidate that occurs on election day, so too is a ratification an act that occurs on the day the ratification votes are cast. Here, the affected employees expressed their consent - their ratification - of the proposed contract at the meetings held on November 15 when they cast their ballots; the ministerial act of counting those ballots on November 22 did nothing to change that actual act of ratification that occurred the week prior.

Notwithstanding the above, the Employer argues that the policy underlying the contract-bar rules mandates a rule that where ratification is a condition precedent to a contract becoming finalized for contract-bar purposes, the ratification is not consummated until notice of the ratification is received by the employer. In making this novel argument, the Employer urges that the critical element in determining when a contract becomes a contract bar is the moment at which "contractual stability" is reached, a moment the Employer argues that cannot be achieved until an employer receives notice of ratification. (Employer's Request for Review, at pp. 8-9.)

There are at least two reasons why this argument fails.

First, as explained above, under traditional contract law there are circumstances where a contract becomes binding - that is, stabilized - at a moment *before* one of the parties receives notice that a condition precedent has been satisfied. See above at pp. 6-7

and *Garment Workers Local 512 v. NLRB*, *supra*, 795 F.2d at 713 (even under traditional rules of contract law, absent an express requirement that the employer's receipt of notice of ratification be a condition precedent, such notice is unnecessary to the contract formation). See also, *Houchens Mkt. of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 211 (6th Cir. 1967) (absent explicit employer proposal making contract contingent upon union ratification, employer may not repudiate contract for lack of ratification).

Second, contractual "stability" is not the only policy goal underlying the Board's contract-bar rules. The Board made this clear in *Appalachian Shale Products*, *supra* at 1161, where the Board modified its contract-bar rules in order to simplify and clarify "their application wherever feasible in the interest of more expeditious disposition of representation cases." Thus, for example, the Board in *Appalachian Shale Products*, to reduce litigation in this area, simplified the rule regarding prior ratification as a condition precedent to the contract constituting a bar, eliminating the exception that a ratification contingency could be established by an unwritten understanding of the parties. *Id.* at 1162-1163. Thus, simplicity in application of the rule, in order to reduce litigation, is one of the policy goals underlying the Board's design of its contract-bar rule.

The Employer's suggestion that a new rule requiring proof of receipt of ratification notice by the employer, in order for a contract that is contingent upon ratification to constitute a bar, runs contrary to the Board's policy of simplifying the application of the contract-bar rule. The parties are free to agree among themselves that notice to the employer of ratification is one of the contingencies to the finality of their contract, but absent such an agreement, the Employer's suggested rule would complicate, rather than simplify, application of the contract-bar rule. By *adding* an additional

element of proof to all cases where ratification is required, the Employer would invite more, not less, factual questions, as the parties would now be free to contest exactly when the employer received notice of ratification. Such a rule would invite further controversy, as questions would surely arise as to whether the proper representative of the employer had received the notice, and whether the notice was delivered in the proper form. There is no good reason to add these layers of complexity to the Board's contract-bar rule, and to do so would run contrary to the Board's goal of simplifying application of the contract-bar rule "in the interest of more expeditious disposition of representation cases."

CONCLUSION

For the reasons stated above, and based on the record as a whole, the Union respectfully requests the Board to deny the Petitioners' and Employer's Requests for Review.

Dated: February 7, 2014

BEESON, TAYER & BODINE

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2014, I e-filed the foregoing Union's Opposition to Request for Review using the Board's e-filing system, and served the same by email and by U.S. Mail on the following:

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